Bernard v. Gulf Oil Co., 619 F.2d 459 (5th Cir. 1980)

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Throughout the history of the United States, perhaps nothing has evoked the outrage of the masses like a restraint on free speech. The first amendment to the United States Constitution boldly states that no law shall be passed that will place a restraint on free speech. In the context of the class action, free speech takes on a new and troublesome meaning.

Under the Federal Rules of Civil Procedure, a court may make “appropriate” orders which deal with the course of proceedings, the methods and manners of notice, the imposition of conditions on parties being represented in the suit, the actual pleadings, and other procedural matters. The limit to which such orders might extend was carefully examined by the United States Court of Appeals for the Fifth Circuit in Bernard v. Gulf Oil Co. (Bernard II). The court held that a judicial order restricting speech violated the first amendment to the United States Constitution and Rule 23 of the Federal Rules of Civil Procedure—the class action rule. In order to understand how the Fifth Circuit arrived at such a momentous decision, the facts and holdings of the case must be examined in great detail.

In April 1976, Gulf Oil Company (Gulf) and the Equal Employ-
ment Opportunity Commission (EEOC) entered into a conciliation agreement which covered Gulf's alleged discriminatory practices against black employees at its Port Arthur, Texas, plant. Gulf agreed to end all discriminatory practices, implement an affirmative action program, and offer back pay based on length of service to employees alleged to be discriminatees. Gulf agreed to notify affected employees who were not parties to the agreement of their entitlement to back pay. An employee's failure to respond to this notice was to be regarded as an acceptance of the offer. According to Gulf, back pay was offered to 614 present and former black employees of the plant, and to 29 female employees.\(^6\)

While implementation of the conciliation agreement was still in progress, six present or retired black employees of the Port Arthur plant filed a class suit under Title VII of the Civil Rights Act of 1964\(^7\) and section 1981 of the Civil Rights Act of 1866\(^8\) "on behalf

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6. Bernard v. Gulf Oil Co. (Bernard I), 596 F.2d 1249, 1263 & n.4 (5th Cir. 1979). Circuit Judge Godbold dissented from the majority opinion in Bernard I. Id. at 1262. Since Judge Godbold also wrote the majority opinion in Bernard II, the statement of facts which were accurately stated in the dissenting opinion to Bernard I were adopted by the court. 619 F.2d at 463.


(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

The Supreme Court, in Griggs v. Duke Power Co., 401 U.S. 424 (1971), recognized that an employer is not under an obligation to hire a person merely because he was formerly discriminated against, or because he belongs to a minority group. What Congress requires, said the Court, is the eradication of "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." Id. at 431. In Griggs a North Carolina power company had instituted a policy of requiring both a high school education and a satisfactory score on two professionally prepared attitude tests for assignment to any department except labor. The Court found that the company did not follow a policy of overt racial discrimination (although they had followed such a policy prior to 1965) since blacks were afforded the same opportunities for advancement as were whites. Id. at 427-28. The primary focus in a case of former discrimination is whether the employer is treating "'some people less favorably than others because of their race, color, religion, sex, or national origin.'" Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (citing International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977)).


of black employees, black former employees of the plant, and black applicants rejected for employment with Gulf Oil Company (not limited to the Port Arthur plant)." In *Bernard v. Gulf Oil Co.* (Bernard I), the court held that plaintiffs had a bona fide cause of action under the Civil Rights Acts of 1964 and 1866, charging Gulf with discrimination "against blacks in hiring, job assignments, pay scales, discipline and discharge, discriminatory testing and promotion practices, in denying training, and in refusing seniority to blacks." The plaintiffs further alleged that the Oil, Chemical and Atomic Workers' Union had agreed to and complied with Gulf's discriminatory practices.

The class action was brought before the United States District Court for the Eastern District of Texas, where the judge disposed of four issues. First, he dismissed the plaintiffs' Title VII claim because they failed to file suit within ninety days after receiving an official letter stating that conciliation efforts had failed and informing plaintiffs that they were entitled to request a "Notice-of-Right-to-Sue" letter from the EEOC. Second, he granted sum-
mary judgment in favor of defendants on the plaintiffs’ section 1981 claim, finding that the statute of limitations had run, totally barring plaintiffs’ claim.\textsuperscript{14} Third, the district court "'acknowledge[d] a most compelling argument for the equitable doctrine of laches in this particular case.'"\textsuperscript{15} Finally, and providing the fuel to rekindle a rapidly diminishing fire, the court handed down an order prohibiting all communication between the parties to the action, as well as their attorneys, and the members of the putative class, without exception.\textsuperscript{16} This order, however, was later modified by the chief judge of the district court to include two major exceptions. First, the modified order did not forbid communication between attorney and client when the client, on his own initiative, sought to employ the attorney. Second, communications occurring in the "'regular course of business' or in the performance of the duties of an agency or public office (such as the Attorney General) which did not have the effect of solicitation were permitted.\textsuperscript{17} This modified order ignited the conflagration that was to follow.\textsuperscript{18}

\begin{enumerate}
\item the suit without payment of fees, costs, or security. If you decide to institute suit and find you need assistance, you may take this notice, along with any Commission, to the Clerk of the Federal District Court nearest to the place where the alleged discrimination occurred, and request that a Federal District Judge appoint counsel to represent you.
\item \textsuperscript{596} F.2d at 1253 n.3.
\item \textsuperscript{14} \textit{Id.} at 1256.
\item \textsuperscript{15} \textit{Id.} (quoting the unpublished district court opinion).
\item \textsuperscript{16} \textit{Id.} at 1258.
\item \textsuperscript{17} \textit{Id.} at n.9.
\item \textsuperscript{18} The modified order was exactly patterned after those suggested by the Federal Judicial Center in the \textit{Manual for Complex Litigation}, Pt. 2, § 1.41 (1977). The "'Sample Order Prohibiting Unauthorized Communications with Potential Litigants'" was based on an order of Judge Alfred Goodwin of the District of Oregon in Vanlandingham \textit{v.} Denny's Restaurants, No. 69-424 (D. Ore. Oct. 29, 1970). \textit{Id.} The order provided:
\textquote{IT IS ORDERED:}
\begin{enumerate}
\item That Gulf's motion to modify Judge Steger's order dated May 28, 1976 is granted;
\item That Judge Steger's Order dated May 28, 1976 be modified so as to read as follows:
\textquote{In this action, all parties hereto and their counsel are forbidden directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent and approval of the proposed communication and proposed addressees by order of this Court. Any such proposed communication shall be presented to this Court in writing with a designation of or description of all addressees and with a motion and proposed order for prior approval by this Court of the proposed communication. The communications forbidden by this order include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses from poten-}
On appeal to the Fifth Circuit, each of the four issues was ad-

tial and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23, F.R. Civ. P.; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential Court orders therein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court, or the administration of justice. The obligations and prohibitions of this order are not exclusive. All other ethical, legal and equitable obligations are unaffected by this order.

This order does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney, or (2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein.

If any party or counsel for a party asserts a constitutional right to communicate with any member of the class without prior restraint and does so communicate pursuant to that asserted right, he shall within five days after such communication file with the Court a copy of such communication, if in writing, or an accurate and substantially complete summary of the communication if oral.

(3) That Gulf be allowed to proceed with the payment of back pay awards and the obtaining of receipts and releases from those employees covered by the Conciliation Agreement dated April 14, 1976, between Gulf, the U.S. Equal Employment Opportunity Commission and the Office for Equal Opportunity, U.S. Department of the Interior. That the private settlement of charges that the employer has violated Title VII is to be encouraged, United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826 (5th Cir. 1975), cert. denied, 425 U.S. 944, 96 S. Ct. 1684, 48 L. Ed. 2d 187 (1976).

(4) That the Clerk of the Court mail a notice to all employees of Gulf at its Port Arthur Refinery who are covered by the Conciliation Agreement and who have not signed receipts and releases for back pay awards informing them that they have 45 days from the date of the Clerk's notice to accept the offer as provided for by the Conciliation Agreement or such offer will expire until further order of the Court;

(5) That the contents of the notice be the same as that set out in Appendix I;

(6) That Gulf bear the expense of mailing the notice and a copy of the Court's order to the individuals covered by item (4) above;

(7) That all employees who have delivered receipts and releases to Gulf on or before 55 days from the date of the Clerk's notice shall be deemed to have accepted the offer as contained in the Conciliation Agreement;

(8) That any further communication, either direct or indirect, oral or in writing (other than those permitted pursuant to paragraph (2) above) from the named parties, their representatives or counsel to the potential or actual class members not formal parties to this action is forbidden;

(9) That Gulf inform the Court 65 days from the date of the Clerk's notice to be sent by the Clerk of the Court of the names of potential or actual class members who have accepted the offer of back pay and signed receipts and releases pursuant to the Conciliation Agreement and the names of those who have refused or failed to respond.

596 F.2d at 1258-59 n.9.
dressed, in turn, by the court. Subsequent to the district court's holding, the Fifth Circuit noted, in *Zambuto v. American Telephone & Telegraph Co.*, 19 that the ninety-day period in which one must file suit under Title VII does not commence until a letter requesting the notice of right-to-sue is received by the EEOC and the notice itself is dispatched. Therefore, the district court had erred in dismissing the individual Title VII claims of Bernard and Brown (two of the six employees or former employees representing the class), who had filed a claim with the EEOC. 20 Moreover, since the class claims and the claims of the other named plaintiffs who had failed to file claims with the EEOC were properly before the court, 21 the court erred in dismissing these claims. 22

The court of appeals also reversed the district court's summary judgment in favor of defendants on plaintiffs' section 1981 claim, noting that in none of defendants' affidavits did they deny that they had discriminated against blacks. 23 Therefore, a factual issue did exist and summary judgment was improper. In addition, the Fifth Circuit panel recognized that plaintiffs' claim was not totally barred by the statute of limitations, as the district court had held. 24 The limitations question turned on whether the statute begins to run when the elements necessary for the cause of action first arise, or from the last date on which a defendant violated a plaintiff's rights. The former argument, said the court, would be "frivolous" because the statute of limitations would have expired two years after the defendants first began discriminating against the plaintiffs, regardless of whether the discrimination continued

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20. 596 F.2d at 1254.
21. See Wheeler v. American Home Prods. Corp., 563 F.2d 1233, 1237 (5th Cir. 1977) (recognizing that relief cannot be granted on a class action basis without first approving the party's status as a class); Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968).
22. 596 F.2d at 1254-55.
23. 596 F.2d at 1255. Under FED. R. CV. P. 56 the party moving for a summary judgment has the initial burden of proving there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Since the defendant did not provide any factual support for its claim, through affidavits, documents, or other evidence, the plaintiffs had no duty to respond to the motion or to present opposing evidence. See, e.g., Boazman v. Economics Lab., Inc., 537 F.2d 210, 213 (5th Cir. 1976).
24. 596 F.2d at 1255. The court agreed with defendants that the applicable statute of limitations was that provided by TEX. REV. CIV. STAT. ANN. art. 5526 (1958) (two years). 596 F.2d at 1255 (citing Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1379 (5th Cir. 1974)).
until the time that the plaintiffs filed suit. The court adopted the latter position, limiting the plaintiffs' recovery "to those violations occurring within the two year period immediately preceding the filing of the complaint or thereafter."

In holding the doctrine of laches inapplicable, the court recognized that laches could apply to Title VII and section 1981 actions brought by private plaintiffs, even in instances where the statutes of limitation have not run. For the doctrine of laches to apply, however, the court must find both "that the plaintiff delayed inexculsably in bringing the suit and that this delay unduly prejudiced defendants." The court found that for the purposes of summary judgment, the plaintiffs' failure to file their claim until after the EEOC process was complete was not inexculsable delay. Moreover, any prejudice suffered by defendants was caused by their own negligence and disregard of EEOC regulations. Therefore, the court found the doctrine of laches inapplicable.

What created a furor in this case and caused the Fifth Circuit to meet en banc, however, was not the holding that the Title VII claims should have been heard on their merits by the district court. Likewise, there was no controversy over whether the three-judge panel had erred in reversing the district court's summary judgment on the section 1981 claim. Nor did the judges of the Fifth Circuit question the soundness of the panel in holding the doctrine of laches inapplicable. Rather the appellants' petition

25. 596 F.2d at 1255-56.
26. Id. at 1256. The court cited, as authority, Franks v. Bowman Transp. Co., 495 F.2d 398, 406 (5th Cir. 1974), rev'd on other grounds, 424 U.S. 747 (1976). In Franks, the Fifth Circuit held that Title VII and § 1981 claims are equitable in nature. The doctrine of laches is also considered an equitable remedy. In an equitable action, an equitable defense may be raised, including the doctrine of laches. Id. See also Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969)(a claim for back pay is not in the nature of a claim for damages, but is an equitable remedy).
27. 596 F.2d at 1256. See, e.g., Save Our Wetlands, Inc. v. United States Army Corps of Eng'rs, 549 F.2d 1021, 1028 (5th Cir.), cert. denied, 434 U.S. 836 (1977) ("The mere lapse of time does not constitute laches.").
28. 596 F.2d at 1256.
29. Id. at 1257.
30. "EEOC regulations required defendants to maintain all records relevant to the Title VII claims . . . ." 596 F.2d at 1258 n.8. Moreover, defendants admitted that plaintiffs' § 1981 claims were nearly identical to their Title VII claims. Therefore, the court held that defendants could not have been prejudiced with respect to either Title VII or § 1981. Id. Evidently, defendants' records lacked sufficient documentation to support a claim of unreasonable delay or prejudice.
31. Id. at 1257.
32. 619 F.2d at 463. On rehearing, the Fifth Circuit, en banc, adopted without comment the holdings of the three-judge panel on the Title VII, § 1981 and laches claims. Id.
for rehearing en banc was granted for the purpose of scrutinizing the district court's pretrial nonsolicitation order forbidding communication between "all parties hereto and their counsel" and "any actual or potential class member not a formal party" without the court's consent.33

Such an order in the class action context is contrary to the rule in ordinary litigation that communications between attorney and client are liberally permitted, and even encouraged, as part of the attorney-client privilege.34 According to the Manual for Complex Litigation,35 prior restraint of communications among parties in a class action is justified upon four grounds. First, allowing communications may encourage attorney solicitation of potential and actual class members. Second, attorney solicitation of fees may result. Third, attorneys for defendants may encourage potential and actual class members to "opt out" of the class action. Finally, attorneys may "misrepresent the status, purposes and effects of the action and of court orders therein and which may confuse actual and potential class members and create impressions which may reflect adversely on the court or the administration of justice."36

There are several reasons why a party to a class action might desire to communicate with other parties to the action. For example, in a class action, one United States District Court permitted class counsel to communicate with putative class members where the communications were necessary to determine the parties' positions on the action and where a potential class member had indicated his desire to engage in such communications.37 Another district court has stated that its local rule only forbids solicitations by formal parties requesting a class member to opt out of a class action.38 However, that district court ordered that all communica-

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33. 619 F.2d at 465. For the complete text of the order see note 18 supra.
35. MANUAL FOR COMPLEX LITIGATION, PT. 1, § 1.41 (1978).
36. Id.
37. Bottino v. McDonald's Corp., 1973-2 TRADE REG. REP. (CCH) ¶ 74,810 (S.D. Fla. 1973). The court modified a local rule to the contrary—Local Rule 19B—in order to achieve this result. Presumably, Local Rule 19B of the United States District Court for the Southern District of Florida was similar to the rule providing for the nonsolicitation order in Bernard—Local Rule 6 of the United States District Court for the Southern District of Texas.
38. American Fin. Sys., Inc. v. Pickrel, 18 FED. RULES SERV. 2d 292, 295 (D. Md. 1974). The court recognized that Local Rule 20 of the United States District Court for the District of Maryland is not aimed toward preventing the negotiation of settlements between a defen-
tions "from the named parties, their representatives or counsel to the potential class members is forbidden without the prior approval of this court." 38

Permitting communications between the class and the class opponent may arguably preserve an ongoing business relationship between the two. So long as the parties do not discuss the litigation, they may discuss other routine matters as may arise in the "regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of . . . misrepresenting the status, purposes or effects of the action and orders therein." 40 Restraining direct communication with the class is also desirable to the class opponent, in the case of an ongoing business relationship, in order to prevent harm to the goodwill of the opponent's business by communications from the class attorney to the class. 41 Finally, a rule allowing direct class-opponent communication with the class may violate one of the canons of the American Bar Association Code of Professional Responsibility, which provides that counsel may communicate with an opposing party only through that party's attorney. 42

38. . . .


40. Local 734, Bakery Drivers Pension Fund Trust v. Continental Ill. Nat'l Bank & Trust Co., 57 F.R.D. 1, 2 (N.D. Ill. 1972). Civil Rule 22 of the United States District Court Rules for the Northern District of Illinois, like the rule at issue in Bernard provides, in part:

In every potential and actual class action under Rule 23 F.R. Civ. P., all parties thereto and their counsel are hereby forbidden, directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent of and approval of the communication by order of the Court." (emphasis in the original)

41. Such a situation was not permitted by the Third Circuit to occur in Katz v. Carte Blanche Corp., 496 F.2d 747 (3d Cir.), cert. denied, 419 U.S. 885 (1974). In Katz, the court recognized the possible "catastrophic" effect of its card holders (who were also its account debtors) withholding payments when they received notice of the pending class action. Carte Blanche Corporation pointed out that many of its account debtors were delinquent in their payments "entirely apart from delinquency induced by a class action notice." Id. at 757. The Third Circuit could not disregard such "substantial elements of unfairness" to Carte Blanche Corporation. Id. at 758.

42. A.B.A., CODE OF PROFESSIONAL RESPONSIBILITY, CANON 7 (1976). See also Developments in the Law—Class Actions, 89 Harv. L. Rev. 1318, 1599 (1976). DR 7-104 provides, in part:

(A) During the course of his representation of a client a lawyer shall not:

(2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.
It is evident that when the proper circumstances exist, communication between counsel and all parties (actual or potential) to the class suit may be permitted without prior court approval. However, these situations have been strictly limited by the courts. It was not until the constitutional issues were addressed that these situations took on a new and broader significance.

In Bernard II, the Fifth Circuit en banc held that the district court's order restricting communication by parties and their counsel with actual or potential members of the class was an unconstitutional prior restraint on speech. Also, the order was unconstitutional even if tested under the less stringent standards applicable to subsequent restraints on speech. Finally, the court found that the order was not an "appropriate order" within the scope of the class action rule.43

In Bernard I, the panel had approved the district court's modified order, holding that the order was "a permissible exercise of the trial court's discretionary power in controlling a class action."44 The court cited an important decision handed down by the Fifth Circuit, In re Air Crash Disaster at Florida Everglades,45 for support of its proposition that the trial court has vast discretion in managing the class suit.46 The Bernard I panel rejected the plaintiffs' contention that the order would reduce their ability to manage effective discovery.47 The trial judge is expected to exercise "minimal judicial control of these communications" which means that counsel may have his request for permission to communicate with actual or potential class members who are not formal parties to the action handled by telephone if he is at a distance from the court.48 The Bernard I panel found that the plaintiffs had not shown that the trial judge's assertion of "minimal control" consistent with Rule 23 would prejudice them in any way.49 The panel held that the order was not a prior restraint on speech, supporting

43. 619 F.2d at 478.
44. 596 F.2d at 1259.
45. 549 F.2d 1006 (5th Cir. 1977).
46. A trial court has managerial power to control the disposition of its cases with economy of effort for all those involved. Managerial power is a critical requirement for judges, especially in the area of class actions. Id. at 1012. See also Huff v. N.D. Cass Co., 485 F.2d 710 (5th Cir. 1973). In Huff, the court held that the trial judge, in his role as manager, may permit discovery related to issues involved in maintenance of the class suit, and may order an evidentiary hearing at which he may even make evidentiary inquiry, rather than being bound by the face of the pleadings. Id. at 713.
47. 596 F.2d at 1260.
49. 596 F.2d at 1260.
its decision with one district court case, *Waldo v. Lakeshore Estates, Inc.*,\(^{50}\) and with language from the recent revision of the *Manual for Complex Litigation*.\(^{51}\) Contrary to *Bernard I*, the crux of the holding in *Bernard II* is that such an order clearly represents a serious restriction on first amendment rights.\(^{52}\)

Prior restraints on freedom of speech and the press have long been disfavored in the law.\(^{53}\) While a prior restraint is not per se unconstitutional, it bears a heavy presumption against constitutionality.\(^{54}\) Although the prior restraint in *Bernard II* was not deemed justified by the court, there are occasions when a prior restraint will be permitted. In general, a system of prior restraint "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system."\(^{55}\) A prior restraint may be justified only if the expression

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50. 433 F. Supp. 782 (E.D. La. 1977). In *Waldo*, purchasers of real estate brought a class action alleging factual misrepresentations and other irregularities in connection with the purchases. The district court held that the rule forbidding communication fulfilled a legitimate governmental interest and was not violative of first amendment rights. *Id.* at 789-91. *Waldo* may be distinguished from *Bernard II* since it did not address the prior restraint issue in the context of nonprofit client solicitation in a civil rights class action.

51. *Manual for Complex Litigation*, Pt. 1, § 1.41 (1978 Cum. Supp.). The *Bernard I* panel refused to discuss the constitutionality of the order as a prior restraint on free speech, after finding that the defendants' constitutional rights were adequately safeguarded by the order, pursuant to subparagraph of paragraph two of the order which partially excepts the assertion of a constitutional right to communicate with another party. 596 F.2d at 1261. The party asserting a constitutional right must file within five days after the communication either a copy of the communication or a summary of any oral communication. *See* note 18 *supra*. At best, this is a weak attempt to assure the parties some semblance of their constitutional rights.

52. 619 F.2d at 466.

53. *Id.* at 467 (citing *Near v. Minnesota*, 283 U.S. 697 (1931)). In *Near*, the Court recognized that for approximately 150 years, there had been nearly a complete absence of attempts to impose prior restraint on publication. 283 U.S. at 718. Moreover, liberty of speech and the press is within the liberty safeguarded by the due process clause of the fourteenth amendment to the Constitution of the United States. *Id.* at 707.

54. 619 F.2d at 467. In *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-59 (1975), the Court held that the presumption against prior restraints is greater—and the scope of protection broader—than that against limits on free expression which bear criminal sanctions. The rationale is that a democratic society prefers to chastise the few who abuse their rights after they disobey the law rather than to tether them and all others in advance. *Id.* at 559.

55. *Freedman v. Maryland*, 380 U.S. 51, 58 (1965). In an obscene film censorship case, any prior restraint must be limited to a preservation of the status quo for the shortest possible time until a temporary judicial restraint can be ordered. Generally, even in this context, an unlawful prior restraint may be found if the procedure does not assure a prompt final judicial decision. *Id.* at 59. In *Heller v. New York*, 413 U.S. 483, 492 (1973), the Court allowed detention of a copy of an obscene film "for the *bona fide* purpose of preserving it as evidence in a criminal proceeding."

The Supreme Court extended the *Freedman* doctrine to apply to the system by which
sought to be restrained would definitely result in "direct, immediate, and irreparable damage."

In holding that the order entered in this case was an unconstitutional prior restraint on speech, the court in Bernard II examined the requirements for a prior restraint and applied them to the facts of the case. The first requirement for a prior restraint is that it is generally judicial, not legislative, in origin. The order was unquestionably judicial in origin, having been promulgated by the district court.

What next distinguishes a prior restraint from a criminal statute forbidding expression is that "the sole purpose of a prior restraint is suppression rather than punishment." The purpose of a nonsolicitation order was undoubtedly to suppress communication. The trial court in Bernard had previously denied the plaintiffs the right to publish a notice that there was a pending class action, and that putative class members were entitled to consult legal counsel to protect their interests in the suit. The means of enforcement of this order, although both the text of the order and the Manual for Complex Litigation are silent in this regard, is the contempt power of the court. Punishment by contempt has been described as an "important attribute" of a prior restraint that distinguishes it from a criminal statute forbidding a specific type of expression.

A prior restraint is distinguished from a statute prohibiting publication because the former has "an immediate and irreversible


56. International Soc'y for Krishna Consciousness v. Eaves, 601 F.2d 809, 833 (5th Cir. 1979). In Krishna, the Fifth Circuit repeated its firm stand that guilt by association with a group, even when the group has violated the law on numerous occasions, cannot support a prior restraint. This is so, even if it might appear that the chances are great that the "sinner" may sin again. Id. at 833.

57. 619 F.2d at 467-68.
58. Id. at 463.
59. Id. at 468. In Near v. Minnesota, 283 U.S. 697, 715 (1931), a prior restraint provided for no punishment, except for civil contempt, but for "suppression and injunction, that is, for restraint upon publication."
60. 596 F.2d at 1267 (Godbold, J., concurring in part and dissenting in part). Although the "constitutional right" exception in paragraph two of the order seemed to permit retrospective filing in place of prior court approval, counsel in good faith (and also rather tentatively after having been charged with unethical and illegal conduct) asked the court for permission to post the notice. Permission was denied. Id. at 1266-67.
61. 619 F.2d at 468-69.
sanction.”63 It has been said that the threat of criminal or civil punishment after publication “chills” speech, but a prior restraint “freezes” speech at least for a while.64 The present order effectively “froze” the plaintiffs’ speech by severing all communication between attorneys or the named plaintiffs who were clients and actual and potential class members. The order stopped investigation and discovery at a crucial point, just after suit was filed.65 Moreover, the ban on communication was especially harmful since this was a race discrimination case and counsel included members of the Legal Defense and Educational Fund, Inc., who have been noted by the Supreme Court as expert in the field of civil rights litigation.66 At the time the actual and putative class members most needed expert advice, they were cut off from readily available attorneys until the time to make a choice had lapsed.67

The first subparagraph of paragraph two of the order was carefully scrutinized in Bernard II. The subparagraph forbade “solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action.”68 Although the Fifth Circuit has recognized the need in class actions for broad managerial power by the trial court,69 the restraints upon attorney-client communication stretch that power beyond its justifiable limits. As previously noted, the Supreme Court has found occasion to conclude that solicitation may be a constitutionally protected form of expression. In NAACP v. Button,70 the Court held that client solicitation within the context of a civil rights case was entitled to protection under the first and fourteenth amendments. Likewise, in Brotherhood of Railroad Train-

64. Id. These arctic modifiers of “speech” seem to suggest that a subsequent restraint on speech or publication might instill apprehension in the would be violator, but at least he has the option to choose between committing the sin and abstaining therefrom. Conversely, when a prior restraint on speech or publication is imposed, the potential sinner is not even given the chance to choose between good and evil.
65. 619 F.2d at 469-70.
66. NAACP v. Button, 371 U.S. 415, 422 (1963). In Button, the Court found that, in some instances, solicitation of clients by an attorney may be permitted. The Court held the solicitation to be one of the “protected freedoms of expression and association” of the first amendment. 371 U.S. at 422. If plaintiff members of the NAACP Legal Defense and Educational Fund, Inc. were not permitted to solicit clients in this context (civil rights action), then all such activity on behalf of black citizens could be frozen out. Id. at 431-36.
67. 619 F.2d at 470.
68. 596 F.2d at 1258-59 n.9. For the complete order see note 17 supra.
69. In re Air Crash Disaster at Fla. Everglades, 549 F.2d 1006, 1012 (5th Cir. 1977).
The Court held that members of a labor union were constitutionally entitled to advise injured workers of their right to obtain legal advice and to recommend specific lawyers. Any lawyers who accepted employment under this plan were also afforded constitutional protection. The Court soon recognized that the principles announced in *Button* apply not only to litigation "bound up with political matters of acute social moment," but that small causes are entitled to the same protection as great ones. Moreover, rights to engage in group activity are designed to provide "meaningful access to the courts"—a fundamental first amendment right. Finally, a recent Supreme Court decision held that a lawyer who was a member of the American Civil Liberties Union (ACLU) was entitled to send a letter offering free legal assistance from the ACLU, even though this form of solicitation was proscribed by certain Disciplinary Rules of the South Carolina Supreme Court. The Court's rationale lay in the fact that appellant's act was not "in-person solicitation for pecuniary gain."

The *Bernard II* court held the principles espoused in *Button* to be directly applicable to this case. The only material difference between *Bernard II* and *Button* is that in *Button* there was no choice between a lawsuit and a conciliation offer as there was in *Bernard II*. However, the people attending the Legal Defense and Educational Fund meetings in *Button* did not have to choose between initiating a lawsuit and not taking part in a lawsuit. The type of choice the actual or putative class parties would have to make in *Bernard II* and in *Button* does not so greatly differ as to remove it from the scope of protected activity in *Button*. Therefore, stated the court, "The characteristics of the solicitation that brought it within constitutional protection in *Button* are equally present in this case."

72. Id. at 8.
75. In re Primus, 436 U.S. 412, 439 (1978). The Court held that the denial of an appellant's solicitation constituted a violation of the first and fourteenth amendments. The rule at issue was South Carolina's DR 2-104(A) (which is also a part of the American Bar Association's Code of Professional Responsibility) which prohibited a lawyer who gave unsolicited advice from accepting employment except under very limited circumstances. Id. at 420 n.11.
76. Id. at 422. Cf. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (solicitation of business by a lawyer by in-person communication with the intent to receive remuneration has long been viewed as an improper attorney-client relationship).
77. 619 F.2d at 472. See also Great W. Cities, Inc. v. Binstein, 476 F. Supp. 827 (N.D. Ill.
While the court held that the order is a prior restraint, the unconstitutionality of the order rests on other grounds as well. A judicial order imposing a subsequent restraint on speech, while not accorded the same status as a prior restraint, must nonetheless "endure even closer scrutiny than a legislative restriction." Much of the district court's order was vague and overbroad. In Shelton v. Tucker, the Supreme Court held that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties." Although arguably the governmental interest in managing the class action was substantial in Bernard II, the fundamental first amendment rights of the parties involved clearly overshadowed these considerations.

After holding that the district court's order violated the first amendment, the court made short work of the issue of the "appropriateness" of the order under Rule 23(d) of the Federal Rules of Civil Procedure. Although the majority in Bernard II rapidly dispensed with the "appropriate order" question, the dissent in Bernard I shed some light on the issue. Certainly Rule 23(d) requires the district judge to exercise his discretion in making orders since the term "appropriate" connotes the exercise of discretion. What may be appropriate in one context might not be appropriate in another. However, actual or potential communications between parties to a class action in many instances serve to effectuate the purposes of Rule 23 by encouraging common participation in a lawsuit.
Not all members of the Bernard II court believed the constitutional issues should have been addressed. A federal court should not decide federal constitutional questions where a dispositive nonconstitutional ground is available. The concurring judges argued that the majority should have first determined whether the district court's order was an "appropriate order" under Rule 23(d) before even considering the constitutional issues. Interlocutory orders of court in a class action context are certainly reviewable, and the majority should first determine whether the district judge abused his discretion in handing down the order.

The majority opinion is not, as the concurrence states, "a needless excursion into a difficult and little-explored area of constitutional law." The majority supports its decision with persuasive case law, coming in large part from the United States Supreme Court. The court saw that the order represented a "significant restriction on First Amendment rights." Moreover, since no other court of appeals had ruled on the constitutionality of the proposed order form found in the Manual for Complex Litigation, and since the proposed order had been so widely adopted, the court felt com-

addressed the "appropriate order" question without undertaking the "prior restraint" constitutional question. The court held that although a plaintiff's activities in contacting present or former employees to interest them in participating in an employment discrimination suit may have violated the ethics of the legal profession, her actions were not abuses of the class action device since she was encouraging "common participation in the litigation of her . . . discrimination claim." Id. (footnote omitted). See also Rodgers v. United States Steel Corp., 508 F.2d 152 (3d Cir.), cert. denied, 420 U.S. 969 (1975); In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106 (7th Cir.), cert. denied, 444 U.S. 870 (1979).

85. 619 F.2d at 478 (Tjoflat, J., with whom Brown, Gee, Henderson and Reavley, J.J., join, specially concurring).

86. Id., (quoting Hagans v. Lavine, 415 U.S. 528, 547 (1974)). In Siler v. Louisville & Nashville R.R., 213 U.S. 175, 193 (1909), the Supreme Court held that generally a court does not address questions arising under the Federal Constitution when the questions may be otherwise answered, unless there is an important reason. In his often-cited concurring opinion in Ashwander v. Tennessee Valley Authority, Mr. Justice Brandeis reaffirmed the holding in Siler: "[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter." 297 U.S. 288, 347 (1936).

87. 619 F.2d at 479. The concurring judges quoted In re Nissan Motor Corp. Antitrust Litigation, 552 F.2d 1088, 1096 (5th Cir. 1977), in support of their position. Therein the Fifth Circuit stated "Appellate review is necessary to assure that the rights of absentee class members are not inundated in the wake of a district court's brisk supervision." Id. The concurring judges deemed the tool of appellate review to be sufficient to prevent potential abuses of judicial orders. There was no need to address the constitutional question. Id.

88. 619 F.2d at 481 (footnote omitted).


90. 619 F.2d at 466.
pelled to address the constitutional issues. The court recognized three local rules among the district courts of the Fifth Circuit,91 as well as five local rules from districts outside the Fifth Circuit.92

Why did the Fifth Circuit choose the more difficult path—addressing the constitutional issues, rather than taking the road more often travelled—determining whether the trial judge abused his discretion? The court commended District Judge Bue of the Southern District of Texas who, in adopting the rule suggested by the Manual for Complex Litigation, included only the specific prohibitions against communication, rather than across-the-board restraints.93 Judge Bue’s primary reason for departing from the suggested rule was to avoid a violation of the first amendment by overbreadth.94 The court must have recognized that the potential for abuse in such orders is great. Perhaps the court’s overriding interest in the administration of justice required it boldly to forego the simple path, and to venture into the realm of the constitutional determination.

Speculating on the impact of Bernard II is not a simple task. The case has served as precedent on only one occasion since the decision was handed down. The Fifth Circuit, in In re Lilla Ann Norton,95 held that the case at bar “stood squarely on all fours” with Bernard II, and vacated all orders enforcing Local Rule 17 of the District Court for the Northern District of Florida, remanding the case for proceedings consistent with Bernard II.96

The fire may yet be burning since Bernard II has now been appealed to the United States Supreme Court. The petition for writ of certiorari states:

As the district court’s order was based directly upon the proposed

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91. Id. at 467 n.9. See S.D. FLA. R. 19; N.D. GA. R. 3, 221.2; S.D. TEX. R. 6.
92. 619 F.2d at 467 n.9. See N.D. ILL. R. 22; D. Md. R. 20; M.D. N.C. R. 17(b)(6); S.D. OHIO R. 3.9.4; W.D. WASH. R. 23(g).
93. 596 F.2d at 1274 (Godbold, J., dissenting).
94. Id. “The key to a constitutional rule which regulates class communication is to narrow down those instances in which a prior restraint is imposed to those in which the types of communications subject to judicial review before dissemination are clearly defined and clearly capable of Rule 23 abuse.” Id.
95. 622 F.2d 917 (5th Cir. 1980).
96. Local Rule 17 was based on suggested Local Rule 7 of the Manual for Complex Litigation. Id. In re Lilla Ann Norton was a two-sentence opinion with no statement of facts. What may distinguish Norton from Bernard II is that the former controversy was based on a local rule while the latter was based on an order. According to petitioner to the Supreme Court, “the Fifth Circuit seems to draw no distinction between local court rules and orders limiting communications.” Bernard v. Gulf Oil Co., Petition for Writ of Certiorari at 13 n.4 (U.S. Filed Sept. 17, 1980).
order recommended by the *Manual for Complex Litigation*, the Fifth Circuit's opinion is in conflict with the distinguished Board of Editors of the Federal Judicial Center. Moreover, as the *Manual*’s suggested rule and order has been adopted by numerous district courts across the nation, the Fifth Circuit’s decision has implications and importance which reach far beyond the facts of the instant case.97

It will be interesting to note how *Bernard II* is relied upon by the sister circuits. The constitutional issue involved is too significant to elude further discussion and examination.

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